BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	

COMMENTS/OPPOSITION OF GENERAL INSTRUMENT CORPORATION IN RESPONSE TO PETITIONS FOR RECONSIDERATION

Quincy Rodgers,
Vice President,
Government Affairs
Christine G. Crafton
Director, Industry Affairs
Faye Morrison
Government Affairs
Representative
General Instrument Corporation
1133 21st Street, N.W.
Suite 405
Washington, DC 20036-3384

Jeffrey Krauss
Consultant
622 Hungerford Drive
Suite 21
Rockville, MD 20850

Philip L. Verveer
John L. McGrew
Francis M. Buono

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Its Attorneys

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SUMMARY

GI agrees with the petitioners who oppose the Commission's decision to apply the rules adopted in this proceeding to set-top devices which incorporate analog security elements (hereinafter "analog devices"). The record in this proceeding clearly demonstrates that application of such rules to analog devices is unnecessary, contrary to the public interest, and conflicts with the Commission's statutory obligations under Section 629 of the Communications Act. In addition, GI agrees with petitioners who oppose the ban on the provision of "integrated" set-top devices by cable operators and other multichannel video programming distributors ("MVPDs"). Such a ban is inconsistent with the provisions and purposes of Section 629, the Commission's own prior rulings, and the public interest. To the extent the rules adopted in the Order continue to apply, GI agrees with the Wireless Cable Association that the Commission at a minimum should clarify that the prohibition on integrated devices does not apply to devices purchased by MVPDs prior to January 1, 2005.

Because GI believes that the prohibition of integrated devices is arbitrary, capricious, contrary to the Communications Act, and unsupported by the record in this proceeding, GI opposes CEMA's proposal to require MVPDs to cease offering such devices on an accelerated basis.

Finally, GI opposes Time Warner's proposal to impose expansive, burdensome new restrictions on equipment manufacturers which impinge on constitutionally-protected intellectual property rights. The proposal clearly reaches beyond the scope of the Commission's statutory authority, the record, and the purpose of this proceeding.

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COMMENTS/OPPOSITION OF GENERAL INSTRUMENT CORPORATION IN RESPONSE TO PETITIONS FOR RECONSIDERATION

General Instrument Corporation ("GI"), by its attorneys and pursuant to Section 1.429(f) of the Commission's rules,[1] hereby submits the following comments and opposition to petitions for reconsideration[2] filed in response to the Commission's Report and Order in the above-captioned proceeding.[3]

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[1] 47 C.F.R. § 1.429(f); see also Public Notice, Report No. 2294, (August 25, 1998), 63 Fed. Reg. 47495 (September 8, 1998).

[2] The subject Petitions were filed by the Consumer Electronics Manufacturers Association ("CEMA"); the National Cable Television Association ("NCTA"); the Telecommunications Industry Association ("TIA"); Time Warner Entertainment Company, L.P. ("Time Warner"); and the Wireless Communications Association International, Inc. ("WCA").

[3] Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 98-116, Report and Order, 63 Fed. Reg. 38089 (1998) ("Report and Order" or "Order").

I. THE RULES ADOPTED BY THE COMMISSION NEED NOT AND SHOULD NOT APPLY TO SET-TOP BOXES WHICH INCORPORATE ANALOG SECURITY ELEMENTS.

GI agrees with NCTA and TIA that it is unnecessary, inconsistent with the statute, and inappropriate from a public policy perspective to apply the separation requirement and other rules adopted in the Report and Order to set-top devices which incorporate analog security elements (hereinafter "analog devices").

As GI indicated in its comments in response to the Commission's Notice of Proposed Rulemaking (NPRM),[4] the Commission's pre-1996 Act decisions in its equipment compatibility proceeding with respect to the decoder interface and consumer ownership of analog descramblers[5] constitute "prior determinations" under Section 629(d)(1) which effectively exempt analog devices from compliance with the commercial availability requirements imposed pursuant to Section 629(a). Similarly, in its Petition, TIA notes that Congress' decision to enact Section 629(d)(1), when viewed in light of the Commission's prior determinations in the equipment compatibility proceeding, provides a "clear indication" that the requirements of Section 629(a) are not to be applied "retroactively" to the "forty year legacy of [analog] cable television equipment and infrastructure."[6] In its

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[4] See GI Initial Comments (May 16, 1997) at 39-41; GI Reply Comments (June 23, 1997) at 13-14.

[5] Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 Compatibility Between Cable Systems and Consumer Electronics Equipment, FCC 94-80, First Report and Order, 9 FCC Rcd 1981, at ¶¶ 29, 42 (1994) ("Equipment Compatibility Order").

[6] TIA Petition at 2-3; also see NCTA Petition at 14-15.

Order, the Commission fails to explain how, in light of its prior equipment compatibility rulings, the decision to apply the new separation requirement and ban on integrated devices to analog devices comports with Section 629(d)(1).[7]

In addition, as NCTA points out in its Petition,[8] application of the new rules to the "huge embedded base of analog equipment" poses enormous security risks which alone provide a more than ample basis for the categorical exclusion of such devices, pursuant to Section 629(b). Indeed, Section 629(b) not only permits, but requires the Commission to take all steps necessary to ensure that its regulations do not "jeopardize security" of video programming and other services offered by MVPDs, or "impede the legal rights of a provider of such services to prevent theft of service."[9] Given the potential threat to security, GI agrees that "it is far too risky -- and is contrary to the statute -- to require separation of the analog security element from the non-security functions of analog set-top boxes."[10]

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[7] See also discussion at 12-13, n.35, infra.

[8] See NCTA Petition at 7-9 and sources cited therein; see also GI Initial Comments, Appendix A, Stanley M. Besen and John M. Gale, An Economic Analysis of the Commercial Availability of "Navigation Devices" Used in Mulltichannel Video Programming Systems, (May 16, 1997) ("Besen/Gale Analysis") at 13.

[9] 47 U.S.C. § 629(b).

[10] NCTA Petition at 9. NCTA's Petition correctly observes that the Commission's attempts to "accommodate" security concerns fall short of satisfying the requirements of Section 629(b). Id. at 5-6. In particular, NCTA observes, the "exception" provision included in Section 76.1204(d) of the new rules, as described in Paragraph 73 of the Commission's Report and Order, is "so narrow as to be no exception at all." Id. at 6.

Moreover, as the Petitions filed by NCTA and TIA indicate, there are numerous practical problems of a logistical, technical, and economic nature which together make it even more evident that application of the new rules to analog devices is not in the public interest.[11] The Commission's Report and Order does not give adequate consideration to these concerns. For example, the Commission's apparent reliance on the decoder interface standard as a suitable basis for developing a standard for the separation of analog devices pursuant to the new rules is, as NCTA indicates, entirely "misplaced."[12] While in theory it may be possible to utilize the decoder interface as a starting point for the development of an analog separation standard, significant technical issues,[13] cost considerations,[14] and other concerns exist with respect to the development and implementation of such a standard, particularly given

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[11] See NCTA Petition at 9-12; TIA Petition at 2-5.

[12] NCTA Petition at 10-11. As NCTA has observed, "[t]he decoder interface was designed to work with set-back devices connected to new cable-ready TVs, not with set-top devices connected to all TVs, both old and new." Id. at n. 25.

[13] For example, the decoder interface specification, as currently defined, does not offer the level of flexibility required to support the downloading of new consumer-oriented features that many cable operators are deploying today.

[14] As NCTA has indicated, the cost of a separated analog security module is likely to be substantial, if not prohibitive, for cable operators and consumers, particularly given the declining market for analog products. See NCTA Petition at 12, noting that "[i]t is possible -- if not probable -- that these set-back devices could cost as much or more than a new advanced analog set-top or even the commercial navigation device to which they would be connected." The imposition of additional costs of this magnitude would be especially burdensome for smaller MVPDs, in particular those operating in rural areas, and their customers.

the aggressive separation schedule adopted in the Report and Order.[15] In addition, the Commission's arbitrary (and wholly unexplained) decision to require separate analog security modules by July 2000 will force the cable industry to re-allocate significant resources to the analog device separation process that might otherwise be employed to facilitate the development and deployment of new feature-rich digital navigation devices, which the Commission has noted "will be critical to the delivery and deployment of digital broadcast television. . . ."[16]

GI notes that the proposed exemption from the separation rules described by NCTA in its Petition would apply only to "analog-only" devices and would not encompass "hybrid" devices, with certain exceptions.[17] GI certainly agrees with NCTA that "analog-only" devices should be exempted. Moreover, GI believes that an exemption for all "hybrid" devices also is justified. In fact, as NCTA observed in its prior comments, "[t]he same reasoning which compels the conclusion that analog CPE should not be subject to any commercial availability requirements dictates that so-called 'hybrid' CPE (i.e., set-tops with both analog and digital capabilities) be

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[15] NCTA Petition at 11-12. As NCTA notes, the 7/1/2000 separation deadline adopted by the Commission is "more aggressive" than the September 2000 deadline proposed by NCTA, based on the timetable adopted for completion of the OpenCable™ process, which applied only to digital equipment. Id. at 4.

[16] Report and Order at ¶ 76.

[17] See NCTA Petition at 16-17.

similarly exempt during the relatively brief transition period when they will be provided by MVPDs."[18]

Circuit City has asserted that the adoption of an exemption from the separation requirement for the analog portion of "hybrid" devices may in certain limited circumstances adversely impact the ability of retailers to provide products connecting to such devices.[19] However, even assuming such concerns are valid, they are limited in nature and are clearly outweighed by the substantial security risks, technical hurdles, cost considerations, and other practical problems associated with the imposition of a separation requirement which extends to both the analog and digital security elements of "hybrid" devices in general or some subset thereof.[20]

Accordingly, consistent with its own prior comments,[21] GI continues to believe that for all the above-described reasons a

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[18] NCTA Comments (May 16, 1997) at 13. In particular, NCTA noted that "[t]o the extent that such a hybrid set-top has an analog capability, it is subject to the same concerns about security and signal theft as are pure analog boxes." Id. In its reply comments, NCTA reiterated that "[a]ny rules adopted in this proceeding should be limited to digital CPE" and "[a]ny separation requirement should not apply to cable's analog set-top box or so-called 'hybrid' CPE." NCTA Reply Comments (June 23, 1997) at 12.

[19] See Circuit City Ex Parte filing, June 4, 1998.

[20] GI notes that a decision to refrain from imposing the separation requirements adopted in the Commission's Order to "hybrid" devices would not undercut the digital security separation requirement. Any exclusion for "hybrid" boxes would extend only to the analog security elements of such devices, i.e., MVPDs would still be required to provide consumers with the opportunity to obtain a separate digital security module to which they could then attach navigation devices available through retail outlets.

[21] See GI Reply Comments at 14.

forward-looking approach which focuses on ensuring the commercial availability of digital navigation devices, which represent the future of technology in this area,[22] is far more consistent with the statute, the public interest, and the record in this proceeding than the overly-expansive approach adopted in the Commission's Order.

II. BANNING THE PROVISION OF INTEGRATED SET-TOP BOXES CONFLICTS WITH THE PROVISIONS AND PURPOSES OF SECTION 629 AND IS CONTRARY TO THE PUBLIC INTEREST.

GI agrees with those petitioners who objected to the ban on MVPDs providing set-top boxes that perform security and non-security functions in a single "integrated" device, beginning January 1, 2005.[23] As NCTA and TIA explained in their Petitions, the ban on the provision of integrated boxes by cable operators and other non-exempt

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[22] The market for analog set-top equipment is declining rapidly. In 1998, total industry shipments of such devices are expected to decline by approximately 25% from 1997 levels. GI anticipates a similar reduction in shipments in 1999. Amortization of the significant investment required to design, develop, and implement an analog interface would have to be spread across this declining market. Accordingly, application of the new rules to analog devices would provide relatively short-lived value to consumers, while imposing disproportionate costs on those system operators and subscribers who will of necessity remain dependent on analog technology for their service, including in particular operators and subscribers of smaller systems serving less densely populated areas.

[23] 47 C.F.R. 76.1204(a). To the extent this rule continues to apply, GI agrees that the Commission should "clarify that its January 1, 2005 'security separation' deadline will not apply to integrated set-top boxes purchased prior to January 1, 2005." See WCA Petition at 5. As WCA observes, implementation of a rule which bars MVPDs from placing in service integrated boxes purchased but not deployed as of January 1, 2005 would impose enormous "stranded" inventory costs on MVPDs and their customers, which among other things would "seriously jeopardize the launch of competitive digital wireless cable systems in local markets, a result which is in no way consistent with Congress's broader intent to promote MVPD competition." WCA Petition at 2.

MVPDs conflicts with the provisions and purposes of Section 629, as well as the Commission's own prior rulings, and will have a significant adverse effect on industry and consumer interests which the statute was expressly designed to protect.[24]

As an initial matter, the very provision on which the Commission seeks to base its ban on integrated devices, i.e., Section 629(a), explicitly provides that the "commercial availability" regulations adopted by the Commission pursuant to this section "shall not prohibit" any MVPD from offering "converter boxes," a category of equipment which at the time the 1996 Act was adopted was commonly understood by the Commission and Congress to include "integrated" boxes incorporating both security and non-security features and functions.[25]

In this regard, GI notes that in its 1993 Order implementing the cable rate regulation provisions of the 1992 Cable Act, the Commission found that the term "converter box," which was adopted (but not explicitly defined) by Congress in Sections 623(b)(3) of the Communications Act, described a broad category of equipment which encompasses "those boxes that act as an extended tuner for subscribers who do not have a cable-ready television [i.e., a "basic"

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[24] See NCTA Petition at 18-25; TIA Petition at 5-7; Time Warner Petition at 3-5.

[25] See NCTA Petition at 18-19; TIA Petition at 5; see also Statement of Commissioner Michael K. Powell, Dissenting in Part ("Powell Statement") at 1, opposing the ban on integrated devices and noting that "the statute squarely commands that '[s]uch regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes.'"

converter], those boxes that descramble a signal, and addressable boxes."[26] While the first type of converter described by the Commission performs only a non-security function, the latter two types clearly describe devices which incorporate both security functions (i.e., descrambling, addressibility) as well as non-security functions (e.g., tuning). In contrast, in its 1994 order implementing the equipment compatibility provisions adopted in Section 17 of the 1992 Cable Act, the Commission specifically limited the scope of the rule which required cable operators to advise subscribers of the availability of set-top devices from retailers to include only "basic converters without descrambling or other access control functions."[27]

What these two examples demonstrate is that prior to enactment of the 1996 Act, the Commission employed the term "converter box" to refer to a broad category of set-top devices, including those which integrate security and non-security functions, and used qualifying language (e.g., "basic converter") where it intended to address a more limited class of devices. Indeed, the Commission's NPRM in the instant proceeding acknowledges that, in the absence of qualifying

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[26] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, FCC 93-177, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5800, n.641 (1993) ("Cable Rate Regulation Order").

[27] Equipment Compatibility Order at ¶ 72 (emphasis added), describing new rule Section 76.603(e)(2)(i), now 47 C.F.R. § 76.630(d)(2)(i), which refers to "simple converter devices without descrambling or decryption capabilities." Id. at Appendix A.

language, the term "converter box" encompasses integrated boxes, observing that:

> [H]ome signal security control set-top boxes -- commonly referred to as descramblers -- are often combined with other control equipment, such as signal tuners. . . . Combined, the control equipment constitutes a 'converter box' . . . .[28]

As a general rule, when Congress uses a term which has already been defined by an administrative agency, Congress is deemed to have adopted the agency's definition when it writes that term into the agency's governing statute, absent the explicit adoption of a different definition in the legislation itself.[29] The Commission's prior conclusion in its 1993 Cable Rate Regulation Order that the term "converter box" includes devices which integrate security and non-security functions, coupled with Congress' unqualified instruction that the Commission "shall not prohibit" any cable operator or other MVPD from offering "converter boxes," clearly compels the conclusion that Section 629(a), by its terms, bars the Commission from imposing a ban on MVPD provision of "integrated" devices.

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[28] In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, FCC 97-53, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5642 (1997) (emphasis added).

[29] See, e.g., Bragdon v. Abbott, ____ U.S. ____, 118 S.Ct. 2196 (1998) (Congress intended to ratify agency's construction of the term "disability" to include HIV infection when it repeated the same term in a subsequent statute); Lorillard v. Pons, 434 U.S. 575, 580-581 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citations omitted).

This conclusion is further supported by other provisions of the 1996 Act, demonstrating that when Congress meant to address a more limited sub-type of the broad converter box category, it did so by using qualifying language.[30] For example, in the amendments to the equipment compatibility provisions adopted in the 1996 Act, Congress directed the Commission to consider "the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes . . . unrelated to the descrambling or decryption of cable television signals."[31]

The Commission's ban on integrated devices conflicts with other aspects of Section 629 as well. As NCTA observes, the record in this proceeding clearly demonstrates that "embedded security contained in integrated equipment is a more secure method of protecting

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[30] See, e.g., Rusello v. United States, 464 U.S. 16, 23 (1983) (concluding that Congress intended that the term "interest" in the RICO statute had a broad meaning in one section and a more restricted meaning in other sections, and noting that had Congress intended to restrict the meaning of the term in the subject provision "it presumably would have done so expressly," as it had done in the other subsections through the use of qualifying language).

[31] 47 U.S.C. § 544a(c)(1)(A) (emphasis added). The use of the term "converter box" by Congress to identify a broad category of devices that includes "integrated" boxes can also be seen in the "equipment averaging" provisions of Section 623(a)(7) and the Commission's decisions implementing this section, which allow cable operators "to aggregate . . . their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category." 47 U.S.C. § 543(a)(7) (emphasis added). In response to a request for declaratory ruling, the Commission's Cable Bureau clarified that Motorola's Homeclear™ integrated descrambler units should be treated as "converter boxes" for equipment averaging purposes. In the Matter of Motorola's Homeclear™ System, Request for Declaratory Ruling, Order 12 FCC Rcd 20505, 20509, n.32 (Cable Serv. Bur. 1997).

intellectual property."[32] GI submitted extensive evidence in the record demonstrating that embedded security contained in integrated devices provides a superior method of preventing signal piracy than split or separate security systems.[33] The Commission's decision to bar cable operators from providing integrated boxes with embedded security requires operators to forego the enhanced security provided by such devices, a result which is plainly "contrary to the spirit, if not the letter, of Section 629(b)."[34]

In addition, the prohibition on MVPD provision of integrated boxes is wholly inconsistent with the Commission's prior ruling, in its equipment compatibility rulemaking, that it is in the public interest to allow cable operators to provide integrated devices, even in an environment in which non-security devices are made available at retail.[35] As a result, the rules adopted by the Commission conflict with the provisions of Section 629(d) as well.[36]

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[32] NCTA Petition at 19-20.

[33] See GI Comments at 60, Besen/Gale Analysis at 13; GI Comments, Appendix B (providing a technical description of the various types of analog and digital security technologies); id., Appendix D (GI white paper discussing the technical and security problems with smart card technology and the superiority of embedded systems). GI also brought in to the Commission security experts who conducted a seminar for over 15 Commission staff members on why embedded security is superior to separated security in protecting intellectual property distributed over MVPD networks. See GI ex parte submission, May 21, 1998, discussing the "Necessity for Embedded Security." The Report and Order completely ignores all of this record evidence in banning integrated devices.

[34] NCTA Petition at 20; see also TIA Petition at 6.

[35] See NCTA Petition at 21; see also Statement of Michael K. Powell, Dissenting in Part, at 2 ("I am further perplexed by the majority's divergence, without explanation, from our own instructive prior precedent."). Nor can the Commission reasonably argue that
(continued ...)

As Commissioner Powell has observed, the evidence submitted in this proceeding indicates that the Commission's ban on MVPD provision of integrated devices also is inconsistent with and "may in fact contradict another goal of Section 629, to spur innovation and competition."[37] The Petitions filed by NCTA and TIA, as well as GI's own prior submissions, describe in some detail the adverse impact which the ban on the provision of integrated boxes will have on competition, innovation, and consumer choice.[38] In addition, as Commissioner Powell noted, the record included other evidence showing that integrated devices further these objectives.[39] Similarly, the

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(... continued)

this is a different statute which warrants a different result. In fact, the statutory provision addressed in the Commission's equipment compatibility rulemaking tracks very closely the retail sale provision of the 1996 Act. Compare 47 U.S.C. § 544a(c)(2)(C) with 47 U.S.C. § 549(a). Nothing has changed in the last two years that could reasonably lead the Commission to a different conclusion. Indeed, the one principal change, namely the cable industry's launch and aggressive pursuit of its OpenCable™ initiative to promote greater commercial availability of cable equipment, would seem to support an approach which imposes less, not more restrictive government regulation.

[36] NCTA Petition at 21.

[37] Powell Statement at 2, citing the legislative history of Section 629 included in the Conference Report on the Telecommunications Act of 1996, S. Conf. Rep. 104-230, 104th Cong. 2nd Sess. 181 (1996) ("Conference Report"), which notes that "[t]he conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services."

[38] See NCTA Petition at 20, 23-25; TIA Petition at 6-7. See also Besen/Gale Analysis, supra n.8, at 17-19; GI Reply Comments, Appendix A, Stanley M. Besen and John M. Gale, A Further Economic Analysis of the Commercial Availability of "Navigation Devices" Used in Multichannel Video Programming Systems, (June 23, 1997) ("Besen/Gale Further Analysis") at 12-14.

[39] See, e.g., Ameritech ex parte statement (June 4, 1998) (indicating that Ameritech was developing integrated set-top devices (continued ...)

ban undercuts the objectives which led Congress to adopt the equipment averaging provision of the 1996 Act, which was designed "to promote the development of a broadband, two-way telecommunications infrastructure"[40] by facilitating the deployment of advanced equipment, including "new digital set-top boxes with embedded security," which NCTA notes were "just then coming to market when Congress adopted this provision."[41] Moreover, implementation of the prohibition will impose substantial added costs on consumers.[42]

Leaving aside the numerous ways in which the Commission's ban on integrated devices conflicts with the express provisions and stated purposes of the statute, it is also clear, as Commissioner Powell has recognized, that there is "nothing in the statute that requires this result and no persuasive policy reason to interfere with the market in this way."[43] In discussing the lack of support for a ban on integrated devices in the statute, Commissioner Powell aptly observed:

(... continued)

with unique functionalities as a way to enter the market and compete with incumbent cable operators).

[40] Conference Report at 167.

[41] NCTA Petition at 21.

[42] In this regard, GI's own internal estimates indicate that even employing the most conservative assumptions, application of the ban to integrated digital devices is likely to result in the imposition of at least $75 in additional equipment costs per customer. Also see discussion of costs associated with application of the new rules to analog devices, supra, at 4, n.14.

[43] Powell Statement at 1.

> The real purpose of section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment . . . We accomplish that objective by mandating that separate security pods are available. This allows commercial manufacturers to produce boxes without being inhibited by security specifications . . . The Commission, however, has not stopped there. It has gone beyond the target established in the statute and adopted a regulation that interferes with market choices for equipment design.[44]

With regard to the purported public policy rationale for the ban, Commissioner Powell's observations are also directly on target:

> The decision to ban eventually the availability of integrated boxes rests on the very speculative conclusion that integrated boxes are an 'obstacle to the functioning of a fully competitive market for navigation devices by impeding consumers from switching to devices that become available through retail outlets.' We have not been asked to ensure that consumers switch to devices that become available through retail, only that they have that choice . . . I fear that the majority decision today denies a cost effective choice for consumers. It is quite plausible to me that the 'impediment' to switching to retail may in fact be a consumer preference for distributor-supplied integrated boxes! I see no reason to attempt to control consumer preferences.[45]

Moreover, as the economic analysis appended to GI's comments demonstrates, "there are no obvious benefits from such a ban," since "[a]s long as MVPD systems provide security-only boxes, they will not be able to obtain market power in the sale of features boxes through the sale of integrated boxes."[46] While consumers may benefit from the

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[44] Id. at 1-2.

[45] Id. at 2-3, citing Order at ¶ 69.

[46] Besen/Gale Analysis at 18.

availability of integrated devices provided by cable operators, "some consumers may still prefer the combination of the security-only and features-only boxes both because they prefer the set of features offered and because large consumer electronics manufacturers are also likely to offer features-only boxes at attractive prices due to significant design and scale economics."[47]

On the other hand, however, as Commissioner Powell's statement indicates:

> Many consumers may not elect to purchase boxes from their local retailer. They may find it inconvenient to have to hike out, plunk down hundreds of dollars for a box, and then get a security pod from their operator. Others may conclude that it is more prudent to lease a box from their provider rather than make an investment in a box, because of rapidly changing technology.[48]

The critical point, from a public policy perspective, is that:

> These consumers should not be forced by regulation to lease a multi-component box (probably with other features such as VCR and DVD capability) at a higher price, simply because we, in our wisdom, decided 'availability' should mean nudging consumers into stores and, at the outset, categorizing their possible preference for integration as an 'impediment' to retail availability.[49]

For all of the foregoing reasons, the Commission's ban on operator provision of integrated boxes should be rescinded, and "[t]he market should be allowed to play this out."[50]

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47 Besen/Gale Further Analysis at 13.

48 Powell Statement at 3.

49 Id.

50 Id.

III. THERE IS NO STATUTORY OR PUBLIC POLICY BASIS FOR THE COMMISSION TO IMPLEMENT A BAN ON THE CONTINUED PROVISION OF INTEGRATED DEVICES ON AN ACCELERATED BASIS, AS CEMA REQUESTS.

As the preceding discussion indicates, the imposition of a ban on operator provision of "integrated" boxes conflicts in a number of respects with the provisions and purposes of Section 629 and other sections of the 1996 Act, and is not in the public interest. CEMA's proposal to implement this unlawful prohibition as soon as separate security components are available (i.e., on July 1, 2000)[51] poses an equal, if not greater, conflict with the express provisions of the statute, and would only increase the adverse impact of the ban on the policies which Section 629 and other relevant sections of the Communications Act were intended to advance.

CEMA asserts that the "phase-out" period established in the Commission's Order would impede efforts to implement the "commercial availability" provisions of Section 629(a), by giving cable operators and other MVPDs "the incentive and ability to 'lock-up' the navigation devices market by 2005 by developing bundled offerings that cannot be replicated by independent manufacturers."[52] However, as the economic analysis appended to GI's initial comments in this proceeding demonstrates:

> [I]f the separations model is adopted and operators are required to offer separate security-only boxes, they will have neither the incentive nor the ability to behave anti-competitively to prevent the development of a retail market for features boxes. As a result,

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[51] CEMA Petition at 2-3.

[52] Id. at i.

there would be no competitive harm from permitting them also to offer integrated boxes.[53]

Moreover, as NCTA correctly observes, the record in this proceeding makes it clear that the consumer electronics retail community itself intends to "integrat[e] its 'set-top' features equipment into television sets, VCRs, DVD players and the like to take advantage of economies of scale and scope."[54] Similarly, GI's prior submissions reflect the reality that large consumer electronics manufacturers are in a position to "offer features-only boxes at attractive prices due to significant design and scale economies" and "may also be able to reduce their costs by combining non-security components with other equipment, such as personal computers, VCRs, and television receivers."[55]

Accordingly, the ability of operators to continue offering "integrated" boxes after July 1, 2000 would not inevitably allow them to "lock up" the customer equipment market, as CEMA contends, given the ability of consumer electronics manufacturers and retailers to offer their own unique "integrated" products. More fundamentally, however, as shown above, it is clear that by its terms Section 629(a)

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[53] Besen/Gale Analysis at 18; see also Besen/Gale Further Analysis at 12-13 ("[i]f MVPDs are required to offer separate security equipment . . . there is no incentive for an MVPD to use integrated equipment to disadvantage sales of non-security equipment in an anticompetitive way.").

[54] NCTA Petition at 20, citing Letter from Robert S. Schwartz, counsel for Circuit City Stores, Inc. to Ms. Magalie R. Salas, FCC Secretary, April 2, 1998, attaching March 27, 1998 ex parte statement.

[55] Besen/Gale Further Analysis at 13, n.16.

neither requires nor permits the Commission to bar operators from providing "integrated" set-top boxes which incorporate security and non-security elements, so long as "the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any [MVPD] service."[56] Other relevant portions of the statute and related Commission orders -- e.g., Sections 629(b) and (d), the Commission's prior determinations in the equipment compatibility proceeding, and the "equipment averaging" provisions adopted in Section 623(a)(7) -- also reinforce the view that operators are to be allowed to offer "integrated" devices to their customers.[57]

In short, there is no legal basis or legitimate public policy rationale for the imposition of a ban on operator provision of "integrated" devices, irrespective of whether the ban is implemented in accordance with the schedule adopted in the Commission's Report and Order or on the accelerated schedule proposed by CEMA.

IV. IN THE ABSENCE OF A DEMONSTRATED MARKET FAILURE AND CLEAR AUTHORITY TO ADDRESS SUCH FAILURE, THE COMMISSION SHOULD DECLINE TO ADOPT EXPANSIVE NEW RULES RESTRICTING THE COMMERCIAL ACTIVITIES OF MANUFACTURERS.

As the discussion above indicates, GI shares a number of the valid concerns raised in Time Warner's Petition, with respect to the complexities and costs to consumers associated with implementation of

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[56] 47 U.S.C. § 549(a). See discussion at 8-11 and 14-15, supra; Powell Statement at 1-3.

[57] See discussion at 11-14, supra.

a ban on operator provision of integrated devices.[58] However, in its Petition, Time Warner goes on to assert that "clarification is necessary with respect to several provisions of the Commission's rules dealing with intellectual property," and urges the Commission to revise its rules to impose broad constraints on the commercial activities of parties other than MVPDs, including equipment manufacturers.[59]

As an initial matter, Time Warner provides no concrete information indicating whether or to what extent situations of the sort described in its Petition do or could in fact exist. Time Warner has certainly not demonstrated that a market failure exists or is reasonably foreseeable. Accordingly, it is unclear that there is a real and substantial issue which (to the extent it arises) cannot be addressed in the marketplace or under the existing rules.[60]

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[58] See Time Warner Petition at 3 ("Time Warner believes that the blanket prohibition on offering integrated equipment after January 1, 2005 is unnecessary, will be costly to consumers and, insofar as analog equipment is concerned, will impede rather than facilitate the transition to digital video.").

[59] Time Warner Petition at 10-11. In particular, Time Warner asserts that "the Commission's rules should not allow equipment manufacture[r]s to enter into arrangements with proprietary services that would preclude or in any way disadvantage an MVPD customer from receiving a competing service offered by the MVPD." Id. at 11. Time Warner goes on to propose that Sections 76.1202 and 76.1204(c) of the new rules should be "expanded to apply to all consumer electronics equipment manufacturers and retailers" and rewritten to include language which would "prohibit any navigation device manufacturer from taking any action or using any contract, agreement, patent right, [or] intellectual property right to prevent or hinder the manufacture or distribution of navigation devices that operate to receive all services and features offered by MVPD systems." Id.

[60] If the scenario described by Time Warner were to arise, with respect to navigation devices which the MVPD itself provides to its customers, the MVPD could and presumably would simply refuse to

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In addition, the hypothetical scenario described by Time Warner has not been shown to be within the scope of concerns which Section 629 was designed to address, at least absent a threat of "electronic or physical harm or theft of service."[61] Moreover, Time Warner has not identified a viable jurisdictional basis on which the Commission could adopt rules which directly regulate the commercial activities of equipment manufacturers.[62] Even assuming arguendo that a valid

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purchase equipment that would "preclude or in any way disadvantage" its customers from receiving a "competing service" which it offers. In the case of navigation devices purchased at retail, other approaches may be available, e.g., the MVPD might advise its customers that the product in question will preclude or make it more difficult for the customer to obtain the MVPD's service, and allow the customer to take this into account in deciding whether to purchase the device. In cases involving a threat of "electronic or physical harm or theft of service," the MVPD could refuse to allow attachment of the device. See 47 C.F.R. § 76.1203.

[61] Id. As the Conference Report indicates, Section 629 was intended "to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box . . . from the cable system or network operator." Conference Report at 181; also see Powell Statement at 1, observing that "[t]he real purpose of Section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment."

[62] Section 629 itself clearly does not authorize the Commission to directly regulate equipment manufacturers in the manner suggested by Time Warner. Nor can such authority be found elsewhere in the Communications Act. See, e.g., In the Matter of American Telephone and Telegraph Company, The Associated Bell System Companies: Charges for Interstate Telephone Service, AT&T Transmittal Nos. 10989, 11027, 11657, Phase II Final Decision and Order, 64 F.C.C.2d 1 (1977), at n.21 ("The Communications Act gives us no explicit or direct regulatory responsibility over the non-operating activities and affiliates of the Bell System . . . . Our regulatory actions must be directed primarily to AT&T and the BOCs over whom we exercise direct regulatory responsibility."); id. at n.31 (Commission concluding that it has "no direct regulatory responsibility for the non-operating activities of the Bell System or over its non-operating affiliates [e.g., its wholly-owned manufacturing subsidiary, Western Electric]") [emphasis omitted]; cf. GTE Service Corp. v. FCC, 474 F.2d 724, 736

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jurisdictional basis could exist to address the concern raised by Time Warner, additional concerns flow from Time Warner's proposed rule, which would impose expansive, potentially burdensome restrictions that needlessly impinge on the constitutionally-protected intellectual property rights of manufacturers.

In its initial comments in this proceeding, GI described its own extensive technology licensing activities.[63] GI continues to believe that given the level of voluntary licensing undertaken in response to customer demands and other marketplace forces, there is no need to consider the imposition of Commission-mandated compulsory licensing requirements. In fact, as the entire industry increasingly moves toward standards-based systems (e.g., MPEG, DOCSIS, etc.), the need for regulations of the sort proposed by Time Warner is, if anything,

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(2nd Cir. 1972) (concluding that FCC lacked jurisdiction to regulate carrier affiliate's data processing business).

A recent indication of the lack of Commission authority in this area is provided by Section 273 of the Communications Act, which establishes ground rules for the manufacture of equipment by Bell Operating Companies. Section 273(f) expressly provides that solely "[f]or the purposes of administering and enforcing this section and the regulations prescribed thereunder," the Commission "shall have the same authority, power, and functions with respect to any Bell operating company or any affiliate thereof [including, in particular, the BOC's manufacturing affiliate] as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act." 47 U.S.C. § 273(f) (emphasis added). This specific grant of authority over BOC manufacturing affiliates underscores the reality that, absent an express congressional delegation, the Commission lacks jurisdiction to impose on manufacturers, such as GI, the type of direct regulation proposed by Time Warner.

[63] GI Initial Comments at 97-100 and Appendix C. In fact, the amount of licensing of its intellectual property that GI has undertaken on either a free or reasonable fee basis has increased significantly over the past several years.